

FILED

AUG 27 2002

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WARREN ROHN, et ux.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

NO. CIV. S-01-0602 FCD PAN ✓
NO. CIV. S-00-1628 FCD PAN
NO. CIV. S-00-1629 FCD PAN
NO. CIV. S-00-2515 FCD PAN
NO. CIV. S-00-2516 FCD PAN
NO. CIV. S-01-0061 FCD PAN
NO. CIV. S-01-0074 FCD PAN
NO. CIV. S-01-0076 FCD PAN
NO. CIV. S-01-0191 FCD PAN
NO. CIV. S-01-0330 FCD PAN
NO. CIV. S-01-0331 FCD PAN
NO. CIV. S-01-0599 FCD PAN
NO. CIV. S-01-0601 FCD PAN

and ALL RELATED MATTERS

ORDER FOR SANCTIONS

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Plaintiffs in these related actions have brought actions under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 through 2680 against Defendant United States of America ("the Government"). Plaintiffs allege that agents and employees of the Government negligently allowed a prescribed fire started on the Government's property to escape onto the property occupied or

1 owned by the plaintiffs.

2 On July 29, 2002, this court issued an order to show cause
3 why sanctions should not be imposed on plaintiffs' counsel, Darin
4 Wright, for his involvement in the scheme to engage in witness
5 tampering of one of the Government's expert witnesses.
6 Plaintiffs' counsel filed a declaration in response to the order
7 to show cause on August 7, 2002. The Government filed a response
8 on August 16, 2002. A hearing on the order to show cause was
9 held on August 26, 2002 at which plaintiffs' counsel appeared
10 with his own counsel, James J. Banks. For the reasons below, the
11 court finds that sanctions should be imposed on plaintiffs'
12 counsel.

13 **STANDARD¹**

14 Federal courts have inherent powers to manage their own
15 proceedings and control the conduct of persons appearing before
16 them. See Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct.
17 2123, 2132, 115 L. Ed. 2d 27, reh'g denied, 501 U.S. 1269, 112 S.
18 Ct. 12, 115 L. Ed. 2d 1097 (1991). By invoking the inherent
19 power to punish bad faith conduct that threatens the integrity of
20 the judicial process, a court must exercise discretion in
21 fashioning appropriate sanctions. See Chambers, 501 U.S. at 44-
22 45, 111 S. Ct. at 2132-2133. "District judges have an arsenal of
23 sanctions they can impose for unethical behavior" including
24 monetary sanctions, contempt, and disqualification of counsel.

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27 ¹ The "Background" section has been omitted for the sake
28 of brevity since the parties are familiar with the factual
background of these cases. For further background, the court
directs the reader to its July 29, 2002 order.

1 Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996).²

2 **ANALYSIS**

3 The position of plaintiffs' counsel in response to the
4 court's order to show cause has changed markedly regarding the
5 conduct in question. While Mr. Wright now expresses regret for
6 his actions, his current position is far different from his
7 testimony before the magistrate judge and his objections to the
8 magistrate judge's findings and recommendations filed on behalf
9 of plaintiffs Warren and Sandra Rohn.

10 In the Rohns' objections and before the magistrate judge,
11 Mr. Wright asserted that his conduct, and the conduct of his
12 clients, was protected by both the attorney-client privilege and
13 the First Amendment. Yet when the magistrate judge found that
14 neither defense had merit, Mr. Wright did not express regret
15 about his actions. Far from apologizing for his behavior, he
16 asserted that such conduct was both legal and reasonable. In the
17 objections filed on behalf of the Rohns, Mr. Wright asserted that
18 parties have a right to speak with witnesses, "so long as they do
19 not attempt to wrongly influence their testimony in doing so."

20
21 ² In Shepherd v. Am. Broad. Co., 62 F.3d 1469 (D.C. Cir.
22 1995), the D.C. Circuit held that "for those inherent power
23 sanctions that are fundamentally penal--dismissals and default
24 judgments, as well as contempt orders, awards of attorneys' fees,
25 and the imposition of fines--the district court must find clear
26 and convincing evidence of the predicate conduct." Id. at 1478.
27 The court has been unable to locate any Ninth Circuit authority
28 on the standard of proof required for a district court's decision
to sanction an attorney under its inherent power. However, even
if the "clear and convincing" standard enunciated in Shepherd
applies, the court finds that plaintiffs' counsel's underlying
predicate conduct has been proved by clear and convincing
evidence. Indeed, plaintiffs' counsel has never disputed that he
engaged in the conduct. Rather, he only argued that the conduct
was justified.

1 Pls.' Objections, filed July 3, 2002, at 15. According to
2 plaintiffs' counsel, the advertisement as well as plaintiff
3 Marijane Poulton's phone call to the Government's expert Cheryl
4 Mikkola did not constitute an attempt to "wrongly influence"
5 Mikkola. Through his counsel at the hearing before the
6 magistrate judge, Mr. Wright argued that the advertisement did
7 not pose any threat to the integrity of the judicial process. In
8 his declaration in response to the order to show cause, Mr.
9 Wright continues to maintain that at the time the proposed
10 advertisement was being formulated, he "believed the
11 advertisement would not have influenced [Mikkola's] testimony or
12 her willingness to testify." Wright Decl., filed August 7, 2002,
13 at 3. As stated in its order filed July 29, 2002, the court does
14 not find this testimony -- that Mr. Wright had no idea of the
15 impact of the advertisement -- credible in the least.³ Nor does
16 the court accept his contention that the advertisement or
17 Poulton's phone call to Mikkola was innocent. Clearly counsel
18 and his clients attempted to wrongfully influence a witness by
19 promoting a countywide boycott of her business.

20 Now, however, in response to the order to show cause, Mr.
21 Wright expresses regret and remorse for his behavior and states
22 that after reviewing this court's July 29, 2002 order, he now

23 ³ The advertisement read, in pertinent part:

24 Ms. Mikkola receives \$85.00 per hour to testify against
25 the Lowden Fire victims. Do you really want a realtor
26 who, for the right price will turn on her neighbors?
27 When you decide to buy or sell your property, choose a
28 realtor who supports our local communities. Choose a
realtor you can respect.

The intent of the advertisement is clear on its face.

1 sees that his "failure to appreciate the full impact the proposed
2 advertisement could have on the judicial process constituted an
3 error in judgment." Wright Decl., filed August 7, 2002, at 3.
4 He states that he now realizes he should have "simply counseled
5 [his] clients to refrain from publicizing their concerns
6 regarding the government report, and, instead, address their
7 concerns in the course of the litigation." Id. at 3. In an
8 effort to explain his conduct, Mr. Wright characterizes his
9 actions as motivated by his "frustrations and passions"
10 "boil[ing] over" and "cloud[ing] [his] judgment" Id. at 2-3. He
11 further states that his involvement with the advertisement was
12 limited to ensuring that the advertisement was factually correct.
13 See id. at 3. Mr. Wright contends that he did not intend to
14 violate any ethical or legal bounds and his lack of bad faith is
15 demonstrated by his decision to halt publication of the
16 advertisement once the Government's counsel indicated that the
17 Government opposed the publication of the advertisement.⁴

18 Plaintiffs' counsel also asks this court to consider that he
19 (1) represents a large number of plaintiffs in these related
20 cases and most of the settlements that have been reached are for
21 allegedly small sums compared to the amounts claimed; (2) has
22 limited his attorneys' fees to 20% of recovery, as opposed to the
23 25% allowed under the Federal Tort Claims Act; (3) has fronted
24 litigation costs for the plaintiffs; (4) assisted many of the

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26 ⁴ The record is unclear as to why the advertisement was
27 not run. At the hearing before the magistrate judge, Mikkola
28 testified that Sara Weninger, the editor of the Trinity County
Journal, called Mikkola to tell her that Weninger had decided not
to run the advertisement. The court has no way of determining what
or who caused Weninger to decide not to run the advertisement.

1 plaintiffs on a pro bono basis with other issues arising from the
2 fire; (5) has lived in his Lewiston office, away from his family,
3 for the past three years in order to provide moral and legal
4 support to his clients; and (6) has received very little income
5 from these cases over the past three years and has been prevented
6 from taking other cases due to the time constraints imposed by
7 his representation of the plaintiffs.⁵ At the hearing, Mr.
8 Wright, through counsel, asked this court to consider that Mr.
9 Wright has never been accused of professional misconduct in his
10 nine-year career; is a solo practitioner; and took these cases
11 when no other lawyer would.

12 While Mr. Wright currently professes that he has seen the
13 error of his ways, it seems that his remorse may have more to do
14 with the specter of monetary sanctions than a newfound
15 appreciation of the Rules of Professional Conduct of the State
16 Bar of California or Title 18 of the United States Code. That
17 Mr. Wright may have suffered some hardships in connection with
18 the representation of the plaintiffs in these cases does not
19 excuse his conduct. Nor does his personal or emotional
20 involvement with his clients allow him to abandon the ethics of
21 his profession and engage in witness tampering.⁶ Moreover, the
22 court finds Mr. Wright's characterization of his behavior as

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24 ⁵ However at the hearing, Mr. Wright stated that he has
25 approximately twenty other clients whom he represents in matters
involving real estate transactions and wills and trust.

26 ⁶ Mr. Wright's assertion that some of his clients have
27 settled for far less than their original claims, implying that
28 his clients have given up monies belonging to them, similarly
does not sway this court. Those plaintiffs that settled made a
conscious decision to do so. If they felt the settlement was not
equitable, they could have chosen not to settle.

1 being in the "heat of passion" contradicted by the record.

2 On May 3, 2002, Mr. Wright faxed documents to plaintiff
3 Connor Nixon which purported to be documents from the report
4 showing the involvement of Mikkola. On May 10, 2002, plaintiffs'
5 counsel faxed a letter addressed to "Connor/Gary/Jesse" which
6 stated that Jesse Rogers had faxed Mr. Wright a copy of the
7 "letter" to be printed in the Trinity Journal. In that fax, Mr.
8 Wright offered several substantive suggestions for revision,
9 including the revision of several paragraphs. See Privilege Log,
10 filed June 4, 2002, Ex. 2. Indeed, at the hearing held before
11 the magistrate judge on June 6, 2002, Mr. Wright admitted that
12 his involvement in the revision of the advertisement consisted of
13 more than just "factual corrections." On May 16, 2002, after
14 receiving an email from Marijane Poulton asking if the letter was
15 a "go," Mr. Wright replied "It's a go" and thanked Poulton for
16 her "work on this matter."

17 Mr. Wright's fax of May 3, 2002 likely provided the stimulus
18 for the advertisement. The drafting and revision of the
19 advertisement took place over the course of approximately a week.
20 The record clearly demonstrates that this advertisement was the
21 result of forethought and planning.⁷ Far from an act of
22 "passion," plaintiffs' counsel's involvement was deliberate and
23 premeditated.

24 The advertisement was to be published in the Trinity County
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28 ⁷ For pertinent text of the advertisement, see supra at 4
n.3.

1 Journal, the only newspaper serving the sparsely populated area.⁸
2 As this court has previously found, the quarter-page
3 advertisement was clearly intended either to punish Mikkola for
4 testifying or induce her not to testify by soliciting a boycott
5 of her business by residents of Trinity County. If the scheme
6 which led to the advertisement had been successful, Mikkola's
7 business would have been severely damaged if not destroyed. The
8 egregious nature of counsel's conduct and the clear threat posed
9 to the judicial process is patent.

10 It is noteworthy that one plaintiff, Paul Schmidt, the
11 Trinity County Sheriff, would not allow use of his name on the
12 advertisement. The court finds it difficult to believe that
13 Sheriff Schmidt understood the dangers of this conduct and Mr.
14 Wright did not. If, however, plaintiffs' counsel in fact did not
15 understand, as he argues, the court is extremely concerned about
16 Mr. Wright's representation of clients before this court or any
17 other court. This concern is magnified by Mr. Wright's failure
18 to recognize that he exposed not only himself but his own clients
19 to possible criminal liability.⁹

20 As indicated above, the court has a range of sanctions
21 available to it, including (1) instituting proceedings to disbar
22 Mr. Wright from this district; (2) disqualifying Mr. Wright from
23 these cases; (3) instituting criminal contempt proceedings; (4)
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26 ⁸ As noted in the court's prior order, the population of
27 Trinity County is approximately 13,500.

28 ⁹ Witness tampering of this type is subject to criminal
liability under 18 U.S.C. § 1512(c).

1 monetary sanctions¹⁰; and (5) lesser sanctions.

2 The court believes that sanctions are necessary for several
3 reasons. First, Mr. Wright's conduct is deserving of sanctions.
4 Second, failure to sanction Mr. Wright's conduct could serve as a
5 signal to other attorneys that this court will not disapprove of
6 this type of deplorable conduct, and could even indicate tacit
7 acceptance of such conduct if the perpetrator exhibits remorse.

8 While sanctions will be imposed, in light of Mr. Wright's
9 lengthy involvement as counsel for the plaintiffs,¹¹ the court
10 finds disbarment or disqualification at this stage of the
11 litigation unfairly prejudicial to Mr. Wright's clients.
12 However, the court does believe that other sanctions will cause
13 plaintiff's counsel to reflect on his professional
14 responsibilities and, in turn, will serve to modify future
15 conduct.¹²

16 ¹⁰ The court notes that California Business and
17 Professions Code § 6068(o)(3) imposes a duty upon an attorney to
18 report sanctions over \$1,000.00 to the State Bar and § 6086.7(c)
19 imposes a duty upon a court to notify the State Bar of sanctions
20 over \$1,000.00.

21 ¹¹ Mr. Wright's involvement with these cases has lasted
22 for at least three years.

23 ¹² While Mr. Wright attests that he has not received
24 substantial fees in connection with these cases, he has made no
25 effort to quantify the fees he has received to date. Therefore,
26 the sanctions imposed have no relationship to the fees received.
27 Instead, the court must impose sanctions that reflect the
28 seriousness of plaintiffs' counsel's conduct.

However, at the request of the court, the Government
provided the following information about the settlements in these
cases:

A. Total Completed Administrative Settlements
\$1,052,197.66

B. Total Administrative Settlements Awaiting Final

(continued...)

CONCLUSION

The following is hereby ordered:

1. Counsel shall pay sanctions in the amount of **\$15,000.00**. Payment should be in the form of a check made payable to The Clerk Of The Court. The sum is to be paid personally by plaintiffs' counsel **not later than ninety (90) days** from the filing of this Order for Sanctions. **Not later than one hundred (100) days** from the filing of this Order, plaintiffs' counsel shall file a declaration attesting that he has paid the \$15,000.00 sanction.
2. This sanction is personal to the attorney, is to be borne by him personally, and is not to be transmitted

¹²(...continued)

- Approval \$1,903,923.15
- C. Total Verbal Settlements Awaiting Signed Agreements and Final Approval \$172,100.00
 - D. Total Completed Settlements of District Court Case \$256,629.55
 - E. Total of All Settlements **\$3,384,850.36**

Notice of Information, filed August 21, 2002. At the hearing, Mr. Wright represented that he has advanced his clients' costs in the total amount of approximately \$500,000, which will be taken out of the total recovery before Mr. Wright's fees are calculated. Therefore, if Mr. Wright's fee is 20% of the total recovery less the costs, once all the settlements are approved, he will have collected \$576,970.07 in fees ($[\$3,384,850.36 - \$500,000] \times 20\%$) as well as being reimbursed for the \$500,000 in costs that he has advanced.

At the hearing, Mr. Wright indicated that there are five other administrative cases and seven other cases before this court which have not reached any understanding as to settlement. While the court will not speculate on the value of these remaining twelve cases, it is likely that they will result in the generation of even more, possibly substantially more, fees for plaintiffs' counsel. Based on this information, the court is skeptical of counsel's claim that he has not received substantial fees in connection with these cases.

1 to his clients by way of a charge of attorney's fees
2 and/or costs.

3 3. Counsel shall read the Rules of Professional Conduct of
4 the State Bar of California in their entirety **within**
5 **thirty (30) days** of the filing of this Order for
6 Sanctions. **Not later than forty (40) days** from the
7 filing of this Order, plaintiffs' counsel shall file a
8 declaration attesting that he has read the Rules.

9 4. Counsel shall complete twenty hours of continuing legal
10 education in professional ethics **within one hundred**
11 **eighty (180) days** of the filing of this Order. This
12 may include attending CLE courses or law school
13 lectures or reading treatises or books. **Not later than**
14 **one hundred ninety (190) days** from the filing of this
15 Order, plaintiffs' counsel shall file a declaration
16 attesting to his completion of the twenty hours,
17 including providing the names and dates of the CLE
18 courses or law school lectures attended or the titles
19 and authors of treatises or books read.

20 5. Pursuant to California Business and Professions Code §
21 6068(o)(3), counsel shall report these sanctions to the
22 California State Bar Association **within thirty (30)**
23 **days** of the filing of this Order. **Not later than forty**
24 **(40) days** from the filing of this Order, plaintiffs'
25 counsel shall file a declaration attesting that he has
26 reported these sanctions to the California State Bar
27 Association.

28 6. Pursuant to California Business and Professions Code §

1 6086.7(c), this court shall report the sanctions
2 imposed on counsel to the California State Bar
3 Association.

4 7. These related cases are set for a further status
5 hearing on February 21, 2003 at 10 a.m.

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7 IT IS SO ORDERED.

8 DATED: August 27, 2002.

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12 FRANK G. DAMRELL, Jr.
13 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Eastern District of California
August 27, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-00602
2:00-cv-01628
2:00-cv-01629
2:00-cv-02515
2:00-cv-02516
2:01-cv-00061
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2:01-cv-00191
2:01-cv-00330
2:01-cv-00331
2:01-cv-00599
2:01-cv-00601

Rohn

v.

USA

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on August 27, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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